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THOMAS S. VIRSIK

MEMORANDUM - draft

March 27, 2003

Re: Allocation of proceeds of any transfer of water – water right

Question: Is it permissible for IID to distribute proceeds of the sale or transfer of conserved water through a sign-up program or to otherwise distribute such funds on a non-ratable basis? Also, can IID distribute funds for or to public purposes, i.e., not to landowners?

Answer: No. California Irrigation District law, on its face and as interpreted by the highest courts, specifically provides that each landowner has a proportionate share of the entire res of the water available. Hence if such res is diminished through conservation for transfer, each proportionate share is diminished and compensation must be on such proportionate share. Also, while the Irrigation District Act is premised on a public benefit from an Irrigation District, that public benefit is measured in terms of lands -- not residents.

Analysis: QUESTION 1 – proceeds of sale or transfer of water right.

Under well-established California law, an irrigation district holds the water rights in trust for the benefit of the lands. IID has conceded as much in the past. When presenting its position to the United States Supreme Court IID stated in no uncertain terms that it did not – and as a matter of law could not – own the water rights. All it owned and could own was the mere legal title to them. The true ownership was the landowners'; it was a property right of the landowners. The United States Supreme Court adopted IID's position and relied on it when reaching its conclusion that the 160-acre limitation did not apply to the landowners in the IID. Yellen at n. 23.

> The court of Appeals makes two interlocking errors (i) in failing to recognize that under California law the rights of the landowners to water delivered by irrigation districts are property rights, not amorphous memberships in a class; and (ii) in failing to recognize that under federal law the rights of the landowners are rights which the Project Act directs the Secretary to serve, and precludes him from taking. This Court's two decrees in Arizona v. California implement that mandate.
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> The court's conclusion that application of acreage limitations to individual landowners (as distinguished from the District) would not impair present perfected rights is premised on a misunderstanding of the nature of water rights "owned" by irrigation districts in California. Although it is true that the District holds the legal title to the water rights, it holds this title in trust for the landowners, who own the beneficial interest. It is the individual landowner – not the District – who puts the water to beneficial use. Under California law, each individual landowner has a statutory right to a definite proportion of the District's water. And each individual landowner has a statutory right to assign his proportionate share. Moreover, the right to such proportionate share becomes appurtenant to the land upon which the water is used.

IID's Petition for Writ of Certiorari, September 14, 1979, pp. 15-17 (footnotes omitted, emphasis added). Decided as Bryant v. Yellen (1980) 447 US 352. Thus, when speaking of IID's water rights, one must by definition mean the water right IID holds in trust for the landowners, since IID does not have any other water right of its own (other than for power generation, which is not applicable here).

What, then, is the nature of this landowner right? Under the present formulation, derived from the original Wright Act, landowners are entitled to an amount of water proportionate to their payment of assessments to the District.

> All water distributed by districts for irrigation purposes shall except when otherwise provided in this article be apportioned ratably to each landowner upon the basis of the ratio which the last assessment against his land for district purposes bears to the whole sum assessed in the district for district purposes.

Water Code § 22250. IID has not collected assessments in many years, so the most likely substitute would be a one share for one-acre basis. That is the RIGHT. That is what would be transferred and for which money may be paid. It has nothing to do with how much water one is using, has used, or even if one's lands have ever been developed. The RIGHT is equated to the assessments (or other proxy of proportion) one has paid.

In contrast, the landowners have the right to transfer or trade this share within the district – no District approval is needed. This is the practical part of the equation – how water is actually used and creates benefits.

> Any landowner may assign for use within the district his right to the whole or any portion of the water appropriated to him pursuant to Section 22250.

Water Code § 22251. These two sections, subject to several special sections about discretion that the Board may have in times of shortage, give the landowners the right to trade water among themselves. Bear in mind, whoever, that while a landowner has the right to demand his proportionate share, he does not have the right to demand more than he can use. Nelson v. Anderson-Cottonwood Irr. Dist (1921) 51 Cal.App.92.

> The right of the landowner to any quantity of water, however, under the irrigation laws pertaining to a district, is limited always to its beneficial use. In other words, under section 18, a landowner has a right to the beneficial use of that portion of the water available for use in the district calculated according to the ratio provided by section 18, or, if not prepared to use that water himself, he may assign his right to any one who is so prepared. It does not mean, as we construe the section, that any landowner is entitled to have so much water delivered to him and then permit the same to run to waste. Considerable testimony was introduced touching the fitness of the land belonging to the plaintiff for profitable rice culture. We do not deem it necessary to go into this question further than to state that beneficial use of water upon lands, and the possibility of the landowner making a profit upon the crops raised by means of irrigation upon his lands, are not one and the same thing. In other words, the fact that a landowner may not be able to make a profit off of any particular crop does not limit his right to use his proportionate share of the water of the district, to pay for which he has been assessed in making the effort.

Id. at 96 (emphasis added). A landowner may not, however, transfer his extra water outside of the district at his pleasure, based in large part on the common purpose of an irrigation district.

> The whole object of the legislation authorizing the organization of irrigation districts is to enable owners of lands susceptible of irrigation from a common source and by the same system of works, to form a district composed of such lands, which district when formed is a public corporation for the sole purpose of obtaining and distributing such water as may be necessary for the irrigation thereof, thus enabling each one to have for his land in the district, the benefit of a common system of irrigation, and bringing about the reclamation of the land of the district from aridity to a condition of suitability for cultivation. It was recognized that without such a common system the individual landowners might be unable to obtain water for the irrigation of their lands, and that a work which would be for the public benefit and general welfare, viz., the reclamation from aridity of large portions of the lands of the state, might never be accomplished if left to individual enterprise. The irrigation district legislation, under which a public municipal corporation may be created for the purpose of furnishing water for the irrigation of the land within the district, has been sustained upon the same ground as has the levee and reclamation district legislation, which is, in effect, that the land included within the limits of such a district, requires, by reason of its situation and condition, the protection or reclamation thus made possible, and that it is for the public welfare that such protection or reclamation should be afforded such land. See In re Madera Irr. Dist., 92 Cal. 296, 311-318, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106.
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> The ultimate purpose of a district organized under the irrigation act is the improvement, by irrigation, of the lands within the district. It can, under the law, be organized and exist and acquire property only for such purpose. This we think is so clearly apparent as not to require further discussion here. Such a district holds all property acquired by it solely in trust for such ultimate purpose, and can divert it to no other use. See section 29 of the act of 1897, St. 1897, p. 263, c. 189. It has to do solely with the irrigation of lands within the district, and cannot appropriate water to any other purpose. The right of a landowner of the district to the use of the water acquired by the district is a right to be exercised in consonance with and in furtherance of such ultimate purpose, viz., for the improvement by irrigation of lands within the district, and in no other way. His right is always in subordination to the ultimate purpose of the trust. So far as he proposes to use the water for the irrigation of lands within the district, he is proposing to use it in furtherance of the purpose of the trust, and is entitled to have distributed to him for that purpose, such proportion as his assessment entitles him to. Section 18, Act 1897, St. 1897, p. 259, c. 189. To this extent only can he be held to be the owner of any share or portion of the water, except that, by virtue of the proviso of section 18 (St. 1897, p. 259, c. 189), he may assign the right to the whole or any portion of the share to which he is entitled. This does not mean, however, that he may make an effectual transfer of his share, free from the trust by which it is encumbered. It still remains subject to that trust, and, therefore, can be used only for the irrigation of lands within the district, and the irrigation district has no authority to distribute it for any other purpose. The right of assignment conferred by the act on a landowner is limited by the whole policy of the statute to an assignment for irrigation within the limits of the district. We do not understand the contrary to have been held in Board of Directors v. Tregea, 88 Cal. 334, 353, 26 Pac. 234.

Jenison v. Redfield (1906) 149 Cal. 500, 503.

The SWRCB approved the transfer of water from IID to San Diego based primarily on section 1011 of the Water Code. That section provides that when one who is entitled to use water conserves, she is entitled to the benefits of the conservation.

> (a) When any person entitled to the use of water under an appropriative right fails to use all or any part of the water because of water conservation efforts, any cessation or reduction in the use of the appropriated water shall be deemed equivalent to a reasonable beneficial use of water to the extent of the cessation or reduction in use. No forfeiture of the appropriative right to the water conserved shall occur upon the lapse of the forfeiture period applicable to water appropriated pursuant to the Water Commission Act or this code or the forfeiture period applicable to water appropriated prior to December 19, 1914.

Water Code § 1011(a). The SWRCB was specifically asked and specifically stated in its decision that section 1011 applies to the transfer. Order WRO 2002-0013 REVISED, § 7.3, page 81.

Applying the above to the present situation in the IID, one can conclude the following: Each acre of land has a RIGHT to a proportionate share of water. Each parcel or acre also has the ability to trade or transfer whatever water is not used (or to get additional water from) within the district. No specific parcel or acre, however, has a right to use a specific amount – only a proportion of the total used. When any acres conserve water from its RIGHT under section 1011 – which includes fallowing – and an outside party is willing pay for the conserved water, the moneys must be divided according to the RIGHTS of the land, and not by how much water is being used or not used, the land's history, or even if the land has ever been developed. It is the payment of assessments (or their equivalent) to the IID that is the basis for compensation under the Irrigation District Act. Having a voluntary sign-up is problematic. One can always volunteer to reject the monetary benefits, of course, and let the other lands receive more. But a voluntary system of participation implies that lands can choose to pay for the right to receive water or not. While lands may choose to not receive water or to receive more or less, by the very nature of an irrigation district, lands in the service area are obligated to pay mandatory assessment or charge for the right to water. They may then pay additional charges for water by units, but that does not change the fact that their RIGHT is based on the mandatory assessment or charge. The monetary benefits must be distributed the same way, only in reverse.

Consider the opposite situation. If IID was to receive an additional 100 K of water from a separate source, how much water would each acre get? A proportionate amount, and not one based on crop or farming uses. Transferring conserved water leads to the same result in reverse – a proportionate payment per acre.

Summary: The right to receive water is based on assessments or other mandatory contributions to IID, resulting in all likelihood a one share for one-acre right to receive water. The right to water has nothing to do with land use, crops, or the use of water. Separately, landowners may freely move water and the right to it within the district so as to accomplish their economic goals. Any influx of moneys in exchange for the transfer of conserved water must follow the rights that control its allocation – one share for one acre. That does not affect the landowners' ability to move water around among themselves in order to protect or enhance their economic livelihoods.

QUESTION 2 – proceeds to landowners.

An irrigation district is a public entity, so why shouldn't the proceeds go to the general public? There is the general trust response, that the Water Code is empathic that the water rights are held in trust and so any diminution or change of trust assets belongs to the beneficiaries (landowners) ands not to the public. Water Code § 22437.

That present codification of this concept goes back many generations, and the contours of the public nature of an irrigation district was decided early on. The United States Supreme Court found that California law was clear that an irrigation district had a public purpose, but the public to whom the district was responsible were the landowners and not the residents. Fallbrook Irrigation

Dist v. Bradley (1896) 164 US 112. The confusion expressed by some that an irrigation district is supposed to operate for the general public benefit perhaps can be found in an early California case decided before the above case and which relied on a early and abandoned form of the irrigation district act. In re Bonds of Madera Irrigation Dist (1891) 92 Cal 296, 278. The later in time Fallbrook Supreme Court decision made plain the limited public nature of an irrigation district in California.

> While the consideration that the work of irrigation must be abandoned if the use of the water may not be held to be or constitute a public use is not to be regarded as conclusive in favor of such use, yet that fact is in this case a most important consideration. Millions of acres of land otherwise cultivable must be left in their present arid and worthless condition, and an effectual obstacle will therefore remain in the way of the advance of a large portion of the state in material wealth and prosperity. To irrigate, and thus to bring into possible cultivation, these large masses of otherwise worthless lands, would seem to be a public purpose, and a matter of public interest, not confined to the landowners, or even to any one section of the state. The fact that the use of the water is limited to the landowner is not, therefore, a fatal objection to this legislation. It is not essential that the entire community, or even any considerable portion thereof, should directly enjoy or participate in an improvement in order to constitute a public use. All landowners in the district have the right to a proportionate share of the water, and no one landowner is favored above his fellow in his right to the use of the water. It is not necessary, in order that the use should be public, that every resident in the district should have the right to the use of the water. The water is not used for general, domestic, or for drinking purposes, and it is plain from the scheme of the act that the water is intended for the use of those who will have occasion to use it on their lands. Nevertheless, if it should so happen that at any particular time the landowner should have more water than he wanted to use on his land, he has the right to sell or assign the surplus or the whole of the water, as he may choose.
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> The method of the distribution of the water for irrigation purposes provided for in section 11 of the act is criticized as amounting to a distribution to individuals, and not to lands, and on that account it is claimed that the use for irrigation may not be achieved, and therefore the only purpose which could render the use a public one may not exist. This claim we consider not well founded in the language and true construction of the act. It is plain that some method for apportioning the use of the water to the various lands to be benefited must be employed, and what better plan than to say that it shall be apportioned ratably to each landowner upon the basis which the last assessment of such owner for district purposes within the district bears to the whole sum assessed upon the district? Such an apportionment, when followed by the right to assign the whole or any portion of the waters apportioned to the landowner, operates with as near an approach to justice and equality as can be hoped for in such matters, and does not alter the use from a public to a private one. This right of assignment may be availed of also by the owner of any lands which, in his judgment, would not be benefited by irrigation, although the board of supervisors may have otherwise decided. We think it clearly appears that all who, by reason of their ownership of or connection with any portion of the lands, would have occasion to use the water, would, in truth, have the opportunity to use it upon the same terms as all others similarly situated. In this way the use, so far as this point is concerned, is public, because all persons have the right to use the water under the same circumstances. This is sufficient.

Fallbrook Irrigation Dist v. Bradley (1896) 164 US 112, 161-163 (emphasis added). The general public may have some right to the non-water rights such as the distribution system, but not to the water rights.

To the extent that anyone is of the view that when the private water companies were purchased by IID, those companies were in any respect operating for the public benefit, the case of Thayer v. California Development Co. (1912) 164 Cal. 117 states otherwise. (IID was created in 1911, but the private water companies were not all immediately purchased by IID.) In Thayer, a landowner complained that Imperial Water Company No. 1 was improperly not willing to sell water to her land. The court sympathized with the landowner, but found that the California Development Company had not dedicated to public use the water it diverted from the Colorado River. The water was made available only to its shareholders, not to the public.

Summary: The companies serving the Imperial Valley were private and did not dedicate their water diversions to public use. By the time IID was formed in 1911 under the irrigation district laws, it was well established that irrigation districts were responsible to the landowners of the district and not the residents, even though the district was for other purposes public. That relationship was codified in its present state in the Water Code some years later and has not changed. IID, like every other irrigation district in the state, is a trustee of the water rights for its landowners and not to the residents of the district.

ADDENDUM:

April 8, 2003

Our further research confirms much of the above. In 1996 before IID became involved in litigation (of its own making) or in state level political posturing (again, of its own making), it clearly and repeatedly told the public that it held the water rights in trust for the landowners in particular. IID went so far as to state to the Imperial County Superior Court that it had a legal duty to listen to and provide its landowners with documents and assistance when requested. In contrast, IID first ignored and still refuses to provide certain IID records to our landowner clients notwithstanding that an irrigation district's records are deemed public. Water Code § 21402. The law has not changed since 1996, only IID's political will to adhere to the law.

Encl: August 5, 1996 letter from President William R. Condit to Presiding Judges of the Imperial County Superior Court.